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Public Law and Policy Research Unit

Submission to the Senate Legal and Constitutional Affairs Committee
inquiry into the Freedom of Information Amendment (New
Arrangements) Bill 2014

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The Public Law and Policy Research Unit at the University of Adelaide contributes an independent scholarly voice on issues of public law and policy vital to Australia's future. It provides expert analysis on government law and policy initiatives and judicial decisions and contributes to public debate through formulating its own law reform proposals.

We thank the Committee for the opportunity to make a submission on the Freedom of Information Amendment (New Arrangements) Bill 2014. We have restricted our submission to the reform of the freedom of information ('FOI') framework. We have not commented upon the reforms concerning the Privacy Commissioner.

Abolition of the Office of the Australian Information Commissioner

We oppose the abolition of the Office of the Australian Information Commissioner ('OAIC'), whether by statute or by the withdrawal of funding (we note that the 2014 Budget papers state that the OAIC will no longer be funded as a separate agency from 1 January 2015). Since it was established in November 2010 the OAIC has played an important and unique role at the Commonwealth level in ensuring government accountability. Its abolition would be a step backwards for Australian democracy.

A combined report of the Australian Law Reform Commission and Administrative Review Council in 1996 recommended that the Commonwealth establish a statutory office of Information Commissioner to oversee the administration of the FOI Act that had been in operation since 1982.¹ It is particularly appropriate to recall the following arguments made for an Information Commissioner in 1996 in light of the Bill currently before the Senate.

There is no person or organisation who has general responsibility for overseeing the administration of the FOI Act. Nor is there any authority which monitors the way agencies administer the Act, identifies and addresses difficult or problematic issues and provides assistance and advice to the public on FOI. Although the Act is overseen to some extent by the Attorney-General's Department and the Ombudsman, the mechanisms provided are fragmented and the Attorney-General's Department is not sufficiently independent of the Executive. The Review considers that many of the shortcomings in the current operation and effectiveness of the Act can be attributed to this lack of a constant, independent monitor of and advocate for FOI.²

This was not a new recommendation, the ALRC and ARC noted that Justice Michael Kirby had called for independent oversight of FOI as early as 1983.³ The ALRC and ARC concluded that an independent FOI advocate was required 'to monitor and improve the administration of the FOI Act and to provide assistance, advice and education to applicants and agencies about how to use, interpret

¹ Australian Law Reform Commission and Administrative Review Council, *Open Government: A Review of the Federal Freedom of Information Act 1982*, Report No 77 (ALRC) and Report No 40 (ARC) (1995).

² Ibid 61 – 62.

³ Ibid 62.

and administer the Act'.⁴ It took a very long time for these proposals to be implemented and the OAIC has been in operation for only 4 years. The Freedom of Information Amendment (New Arrangements) Bill 2014 is a step back into the past.

The FOI Act⁵ promotes a pro-disclosure culture. The objects emphasise that open access to government information promotes Australia's representative democracy and that information held by the Government is a national resource. The OAIC has undertaken significant work in promoting information access in accordance with these objects and encouraging a pro-disclosure culture change within agencies. It has guided agencies in the administration of their disclosure obligations, not just with the publication of guidelines and fact sheets, but with practical assistance such as through phone advice and training courses.⁶ This guidance role is reinforced by reviews of agency compliance⁷ and ultimately by reviews of specific access decisions. Through independent oversight and guidance the OAIC has promoted an open culture within government. The OAIC has also developed government information policy more broadly.⁸ Transferring the functions of the OAIC to other agencies will weaken the FOI system as a whole. The strength of the OAIC model lies in the integration of merits review, oversight, promotion and assistance functions in a single body.

The balance of this submission comments on specific aspects of the Bill as follows:

1. *Transfer of oversight and reporting responsibility to the Attorney-General's Department*
2. *Changes to merits review arrangements*
 - (a) *Mandatory internal review*
 - (b) *Removal of review by the OAIC*
3. *Complaints investigative function conferred on Ombudsman*

1. *Transfer of oversight and reporting responsibility to the Attorney-General's Department*

We have argued above that the OAIC performs an important role in promoting an open culture within government, and providing independent oversight and guidance to government agencies in applying the freedom of information legislation. The Bill shifts responsibility of oversight and reporting to the Attorney-General, making the Attorney-General's department responsible for issuing FOI guidelines

⁴ Ibid 5. It should be noted that the *Open Government* report did not recommend that the statutory office of FOI Commissioner include merits review powers, *ibid* 174.

⁵ *Freedom of Information Act 1982* (Cth) s 3 (amended by *Freedom of Information Amendment (Reform) Act 2010* (Cth)).

⁶ Outlined in: Office of the Australian Information Commissioner, *Annual Report 2013-14*, xvi.

⁷ Office of the Australian Information Commissioner, *Information publication scheme: survey of Australian Government agencies: Compliance with IPS obligations* (2012); Office of the Australian Information Commissioner, *Open public sector information from principles to practice; Report on agency implementation of the Principles on open public sector information* (2013).

⁸ Office of the Australian Information Commissioner, *Towards an Australian Government Information Policy* (2010); Office of the Australian Information Commissioner, *Understanding the value of public sector information in Australia* (2011); Office of the Australian Information Commissioner, *Principles on open public sector information* (2011).

to agencies, collecting FOI statistics and providing annual reports to Parliament on the operation of the Act. For example, under the amendments, the Attorney-General, rather than the OAIC will determine whether certain information is not required to be included in the agency's information publication scheme⁹ and what information need not be published on disclosure logs.¹⁰ The Attorney-General, rather than the OAIC, will issue guidelines that the agency must refer to in implementing the *Freedom of Information Act*,¹¹ including, for example, in relation to working out whether access to a document would, on balance, be contrary to the public interest.¹² The Attorney-General will provide the annual report on the operation of the Act to Parliament.¹³

It is undesirable that these functions are transferred from an independent statutory agency specifically tasked with providing oversight of the freedom of information regime. The transfer of these functions to the Attorney-General's Department, which itself is an agency subject to the freedom of information framework, creates an inherent conflict of interest. For example, the Attorney-General's Department will be responsible for publishing information, and determining whether certain information is not required to be published under the publication scheme; the Attorney-General's Department will be responsible for making decisions about whether disclosure is in the public interest and issuing binding guidelines as to whether such disclosure is contrary to the public interest; the Attorney-General's Department will both be implementing the freedom of information framework and providing a report on how well this has been achieved.

Some oversight will be lost altogether with the loss of the OAIC. Proactive disclosure of information was a major reform introduced in 2010. Currently the OAIC's functions include the review of agencies' publication schemes and agencies have obligations, in conjunction with the Information Commissioner, to review the operation of their information publication schemes every 5 years (if not earlier).¹⁴ The Bill removes these accountability mechanisms and nothing is introduced in their place.

Finally, as we explain further below, removing the functions of oversight and assistance from an independent office that has the power to review decisions (as we argue should be maintained) undermines the authority of the guidelines and directions.

2. *Changes to merits review arrangements*

The Second Reading Speech and Explanatory Memorandum to the Bill explain that the proposed reforms aim to reduce the complexity and delays associated with the current arrangements for merits review of FOI decisions. We query whether the current arrangements are as unsatisfactory as this suggests, and whether the measures contained in the Bill will improve matters. Further, we query whether the proposed changes to the merits review arrangements create a less desirable framework for review of FOI decisions for a person who has been refused access to information.

⁹ Amending *Freedom of Information Act 1982* (Cth) ss 8(2)(g)(iii) and 8(3).

¹⁰ Amending *Freedom of Information Act 1982* (Cth) ss 11C(1)(c) and 11C(2).

¹¹ Amending *Freedom of Information Act 1982* (Cth) s 93A.

¹² *Freedom of Information Act 1982* (Cth) s 11B(5),

¹³ Proposed new s 92A.

¹⁴ *Freedom of Information Act 1982* (Cth) s 8F, 9 and agency obligations in s 7A. See also s 8E assistance provided to agencies.

(a) *Mandatory internal review*

Under current arrangements, a person may apply directly to the OAIC for review of an access refusal decision.¹⁵ This review is free of charge, and need not be preceded by an internal review, although internal review is available. This is not, in our view, a complex process and offers appropriate flexibility for the FOI applicant.

Under current arrangements, applicants have the option of seeking internal review before applying for OAIC review, unless the decision was made by the principal officer of an agency or the Minister.¹⁶ Internal review is an important part of an administrative review framework.

Internal review was made optional by the 2010 reforms.¹⁷ One of the rationales for this reform was that it would encourage agencies to make the best decision at first instance.¹⁸ The Administrative Review Council recognises that internal review can provide a quick, inexpensive and independent review of decisions.¹⁹ However, the Bill's change to the current framework that will *mandate* applicants use internal review before seeking external merits review creates a dangerous barrier to external review rights. While it has been proven that the mandatory internal review reduces the number of external review decisions,²⁰ it is not known why this is so. It may be that this is because there is an impetus for agencies to provide rigorous and effective internal review. However, it may also be that it adds to the length and complexity of the review process for the applicant. By creating an additional step, it runs the risk of creating 'appeal fatigue', and applicants with meritorious cases may not necessarily pursue them to external review.²¹ We recommend that internal review not be made a pre-requisite to external merits review.

The Administrative Review Council also recognised that internal review may, on occasion, be a waste of time for the applicant and the agency, as the original decision is not likely to be altered (this may be, for example, because it is based on an untested or disputed agency interpretation of the law, which may occur in FOI cases in relation to the interpretation of the 'public interest' in the statute). In such cases, the ARC recommended 'provision could be made for the decision to be "expedited" straight through to external review.'²² We submit that should the mandatory internal review be retained in the Bill, provision is made for such a process.

Delay can undermine the FOI process entirely, particularly when the information being sought is of current public interest or attracts media attention. One of the advantages of optional internal review is that applicants can choose to avoid delays associated with internal review. We submit that if the mandatory internal review is retained in the Bill, then s 54C(3) should be amended to provide that the

¹⁵ *Freedom of Information Act 1982* (Cth) s 54L(2)(a).

¹⁶ *Freedom of Information Act 1982* (Cth) pt VI.

¹⁷ *Freedom of Information Amendment (Reform) Act 2010* (Cth).

¹⁸ Explanatory Memorandum, *Freedom of Information Amendment (Reform) Bill 2009*, p 27.

¹⁹ Administrative Review Council *Internal Review of Agency Decision Making* (2000).

²⁰ Administrative Review Council *Better Decisions: review of Commonwealth Merits Review Tribunals, 1995* [6.53].

²¹ See Administrative Review Council *Internal Review of Agency Decision Making* (2000) [3.10].

²² See *ibid* [3.11].

internal review decisions must be made within 14 days. If they are not made within that timeframe then the principal officer of the agency or the Minister will be taken to have affirmed the original decision and external review can be commenced. The current provisions allow for 30 days for the original decision²³ and a further 30 days for the internal review.²⁴ The original decision may involve significant work to determine the scope of the request and search for documents before making the decision. These tasks will already have been completed when the second decision-maker comes to consider the matter on internal review. There are no restrictions on who that second decision-maker may be (other than that they not be the person who made the original decision) and so there is no need to delay internal reviews awaiting a particular decision-maker.

(b) Removal of review by the OAIC

Some complexity and delay may result from the provision for ‘two-tier’ merits review by the OAIC and the Administrative Appeals Tribunal (‘AAT’).²⁵ The 2013 Hawke Report recommended ‘that the two-tier external review model be re-examined as part of a comprehensive review of the FOI Act’²⁶ but also noted that it was too early to decide whether the two-tiered system was effective.²⁷ It is important to note that few applications proceed through both tiers of external merits review. In the 2011-12, 2012-13 and 2013-14 financial years, the OAIC received 456, 507 and 524 applications, respectively, for review of FOI decisions.²⁸ In each of these years, the AAT received fewer than 50 applications for review of FOI decisions.²⁹ This suggests the majority of applicants take their review no further than the OAIC.

Therefore, it seems unrealistic to blame the two-tiered merits review process for complexity and delay in merits review. The Hawke Report noted complaints of delay in the current arrangements,³⁰ and made several recommendations aimed at reducing delay. These included the conferral of power to delegate some merits review functions,³¹ to remit matters to agencies,³² and to resolve matters by agreement.³³ These recommendations could easily be implemented without abolishing either tier of review.

If, however, it is considered desirable to reduce the external merits review process to one ‘tier’, this could be achieved by removing the AAT’s power to review OAIC decisions rather than abolishing the OAIC.

²³ *Freedom of Information Act 1982* (Cth) s 15(5).

²⁴ *Freedom of Information Act 1982* (Cth) s 54C(3).

²⁵ *Freedom of Information Act 1982* (Cth) s 57A(1)(a).

²⁶ Australian Government, *Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010* (2013) (‘Hawke Report’), 37.

²⁷ *Ibid* 36.

²⁸ Office of the Australian Information Commissioner, *Annual Report 2013-14*, 108.

²⁹ Office of the Australian Information Commissioner, *Annual Report 2013-14*, 149.

³⁰ Australian Government, *Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010* (2013) (‘Hawke Report’), 24 and 27-37.

³¹ *Ibid* 30.

³² *Ibid* 31.

³³ *Ibid* 32.

In our view, it is highly desirable for the OAIC to retain its merits review powers. We note the current trend, in both Commonwealth and State jurisdictions, to confer merits review functions on generalist tribunals rather than specialist bodies. We acknowledge the benefits of such arrangements (including efficiency benefits). However, in the case of FOI we believe it is important for a specialist body – the OAIC – to retain its merits review function. This is because of both the OAIC’s specialist expertise within this field and the OAIC’s role (emphasised at the beginning of this submission) in promoting cultural change.

There are two reasons why the merits review function is essential to the OAIC’s role in promoting cultural change. First, the merits review function gives the OAIC greater authority in its oversight and assistance mechanisms (which, we argue for the reasons above, ought to be retained by the OAIC). An agency is more likely to take seriously the OAIC’s advice if it is accompanied by the power to review FOI decisions made by that agency in the future. Secondly, by providing the OAIC with a constant stream of cases, merits review strengthens the OAIC’s understanding of the way in which agencies are applying FOI law and therefore equips the OAIC to perform its educative and oversight functions.

3. *Complaints investigative function conferred on Ombudsman*

Under the Bill, the complaints investigative functions are transferred from the OAIC (upon its abolition) to the Ombudsman. The Ombudsman currently performs a very important oversight and accountability role providing general, independent complaints investigation in relation to administrative actions undertaken by federal agencies.

Despite the independent reputation of the Ombudsman, we believe there are dangers of transferring the complaints investigative functions from the OAIC to the Ombudsman. As we have explained above in relation to merits review, removing the complaints investigative function from the OAIC would undermine its authority in providing oversight and assistance (which, we argue for the reasons above, ought to be retained by the OAIC) and diminish the OAIC’s more global understanding of how agencies are administering the freedom of information regime. Finally, we are concerned that if the responsibility for complaints handling is transferred from the OAIC to the Ombudsman without further resourcing allocated for this purpose, complaints investigation will simply not be able to be performed at the same level by this office.